

The record of the Administrative Law Judge set forth in the March 24, 1994, Award is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the March 24, 1994, Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) Whether claimant suffered accidental injury arising out of and in the course of his employment with Habco, Inc., on the date alleged.
- (2) Whether claimant provided notice to respondent of the injury and, if not, whether respondent was prejudiced by this lack of notice.
- (3) What is the nature and extent of injury and disability suffered by claimant?
- (4) What, if any, is the liability of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings:

Claimant is a thirty-five (35) year old resident of Salina, Kansas, with a high school diploma and some trade school training as a machinist. Claimant was hired by the respondent in December of 1992, performing machinist physical labor. At that time he was experiencing difficulty, with pain going down his leg and around his knees and hips. Claimant suffered a similar injury while working for Coronado Engineering prior to his employment with Habco.

On January 24, 1993, while helping carry a twenty-four (24) foot long machine rail with two other employees, claimant slipped with his left foot, suffering immediate injury and pain in his back and lower extremities. Claimant continued to work for respondent through February 2, 1993, at which time he sought medical care with Dr. Young. Claimant alleges he notified Mr. Steven Lott and Mr. Tom Roche of the incident. Both Mr. Lott and Mr. Roche denied this notice. Mr. Lott does admit that he was notified claimant had a problem when claimant went to the doctor and did not return to work. An accident report was filled out the day after the claimant went to the doctor, which the claimant testified was February 2, 1993. This would indicate the accident report was filled out on February 3, 1993, which would be the tenth day after the January 24, 1993 date of injury. The Appeals Board finds, based upon the evidence in the record, claimant did provide notice to the respondent of an injury on January 24, 1993, within ten (10) days of alleged date of injury. As such, the issue regarding whether or not respondent was prejudiced by a lack of notice is rendered moot.

Claimant received medical care from Dr. Young, a chiropractor, until Dr. Young referred claimant to Dr. Milo Sloo, a board certified orthopedic surgeon. Dr. Sloo examined claimant on more than one occasion ultimately diagnosing degenerative disc disease at the L3-4 level with a possible bulging disc and lumbosacral strain syndrome. He released claimant as of May 3, 1993, rating him at ten percent (10%) impairment to the body and finding claimant had reached maximum medical improvement. He returned claimant to work restricting him to fifty (50) pounds maximum lifting, carrying objects of up to twenty-five (25) pounds on a frequent basis, and advised claimant to avoid bending and stooping. He stated these were standard restrictions for anyone with degenerative disc disease or an overlying strain or sprain. These symptoms were due to claimant's current symptomatology and also to prevent further injury. Dr. Sloo opined that the 1993 incident probably would not have occurred but for the pre-existing problems and went on to assess seventy-five percent (75%) of the impairment to the first injury and twenty-five percent (25%) to the second injury.

When asked about claimant's injury in August of 1992, he stated that claimant would have had the same restrictions after the first injury as he assessed to claimant after the second injury.

There was an allegation by the respondent, supported by information in Dr. Young's notes, that claimant had suffered a slip in the shower which would have resulted in a non-work related aggravation of claimant's back condition. Dr. Sloo did not consider the slip in the shower to be significant and he discounted it in his opinion.

Claimant was examined by Dr. Preston Brent Koprivica at the request of claimant's attorney on October 4, 1993. Dr. Koprivica diagnosed Legg-Perthes' disease which is similar to avascular necrosis of the femoral head of his hip, which the doctor felt was not related to claimant's lower back injuries. In-office testing, including an MRI, showed changes at L3-4 indicating bulging and possibly disc herniation. He diagnosed chronic low back pain associated with the disc disease. He agrees the degenerative disc disease did precede claimant's injuries and felt claimant's injury would have aggravated this disease although not cause it. He assessed claimant at fifteen percent (15%) impairment to the body as a whole indicating that five percent (5%) resulted from the August 1992 injury with the additional ten percent (10%) resulting from claimant's injury in January 1993. He was unable to assess permanent restrictions prior to the January 24, 1993 date of injury but assessed claimant the following restrictions as a result of his January 1993 injury including a fifty (50) pound maximum lift on an infrequent basis, frequent lifting or carrying of up to twenty-five (25) pounds and advised claimant to avoid repetitive bending, pushing, pulling, stooping, lifting or twisting. He felt claimant's degenerative disc disease made him susceptible to further injury and assessed a contribution of at least ninety percent (90%) of claimant's condition to the prior condition suffered by the claimant.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions upon which his right to a recovery depends. This must be established by a preponderance of credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of facts to try to decide which testimony is more accurate and more credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Considering the record as a whole, including the medical reports of Dr. Young and Dr. Sloo, the Appeals Board finds that claimant suffered an injury arising out of and in the course of his employment on January 24, 1993, while employed with Habco, Inc.

K.S.A. 1992 Supp. 44-510e(a) provides in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Claimant was injured on January 24, 1993, and did continue to work for a short period there after. Claimant's testimony indicates that, while he was working, it was not without significant pain or problem. The medical evidence in the record indicates claimant would be prohibited by his physical injury from returning to his employment with Habco, Inc. As such the Appeals Board finds claimant has rebutted the presumption of no work disability under K.S.A. 44-510e.

K.S.A. 1992 Supp. 44-510e states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment."

Mr. James Molski, a vocation and rehabilitation consultant, evaluated claimant at the request of claimant's attorney regarding claimant's ability to perform work in the open labor market and to earn comparable wages. He felt claimant capable of earning \$5.50 to \$6.00 per hour on a regular basis. When comparing claimant's potential for earning wages to claimant's average weekly wage of \$401.00 per week, Mr. Molski felt claimant had suffered a thirty-four to forty percent (34-40%) wage loss. In looking at the income being earned by the claimant subsequent to his injury, Mr. Molski found claimant was earning \$5.00 per hour at a part time job. The Appeals Board finds, as a result of the

evidence in the record, claimant has suffered a forty percent (40%) loss of ability to earn a comparable wage.

Based upon Dr. Sloo's restrictions, Mr. Molski felt claimant had suffered a thirty to thirty-five percent (30-35%) loss of access to the open labor market. In reviewing the restrictions of Dr. Koprivica there was some discrepancy in Mr. Molski's report regarding what, if any, labor market access loss claimant had suffered. The original copy created by Mr. Molski found claimant to suffer a thirty-five to forty percent (35-40%) loss of access to the open labor market based upon Dr. Koprivica's evaluation but the later report submitted to the claimant's attorney found claimant to have suffered a forty to forty-five percent (40-45%) loss of access to the open labor market. The Appeals Board finds claimant has suffered a forty percent (40%) loss of access to the open labor market based upon the restrictions of both Dr. Sloo and Dr. Koprivica and the opinion of Mr. Molski.

In determining the extent of permanent partial disability both the reduction of claimant's ability to perform work in the open labor and the ability to earn comparable wages must be considered. The statute is silent as to how the percentages are to be arrived at. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). Hughes, while indicating a balance of the two factors is required, does not state specifically how this balance is to occur or what emphasis is to be placed on each of these tests.

The Appeals Board, in reviewing the record, finds no legitimate reason to place more emphasis on one factor over the other. As such the Appeals Board finds in giving equal weight to claimant's loss of access to the open labor market and his loss of ability to earn a comparable wage, claimant has suffered a forty percent (40%) permanent partial work disability as a result of his injury on January 24, 1993.

The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of a specific impairment by relieving employers, whole or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(a); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

Liability will be assessed against the Workers Compensation Fund when employers knowingly hire a handicapped employee who subsequently suffers a compensable work-related injury. An employee, is handicapped under the act if the employee is "afflicted with an impairment of such a character as to constitute a handicap in obtaining or retaining employment." Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980).

K.S.A. 44-567(b) states in part:

"In order to be relieved of liability in this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge."

Steve Lott, operations manager for Habco, Inc., supervised claimant when claimant worked for Coronado Engineering, Inc. When claimant applied for employment with Habco, Mr. Lott reviewed claimant's application. Upon review of the application he realized

the seriousness of claimant's back problems, noting specifically the fact that claimant had been off work for a period of time from the earlier back injury.

As stated earlier, both Dr. Sloo and Dr. Koprivica felt there was a connection between claimant's pre-existing problem and his injury on January 24, 1993. Dr. Sloo testified that claimant's 1993 incident would not have occurred but for the pre-existing problems.

K.S.A. 1992 Supp. 44-567(a)(1) provides in part:

"Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund."

Based upon the medical evidence and the testimony of Steven Lott, the Appeals Board finds claimant has proven by a preponderance of credible evidence that respondent hired a handicapped employee after acquiring knowledge of the claimant's pre-existing impairment and further find that claimant's injury and disability probably or most likely would not have occurred but for the pre-existing physical impairment. The Appeals Board finds the Kansas Workers Compensation Fund is liable for one-hundred percent (100%) of the liability in this matter.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson, dated March 24, 1994, should be and hereby is modified as follows:

An Award of compensation is hereby made in favor of the claimant, Steven Lichte, and against the respondent, Habco, Inc., and the insurance carrier, Hartford Accident and Indemnity, and the Kansas Workers Compensation Fund for a forty percent (40%) permanent partial general body disability from an injury occurring January 24, 1993.

Based on an average weekly wage of \$401.00, claimant is entitled to 415 weeks permanent partial general disability at the rate of \$106.94 per week for a total of \$44,380.10.

As of January 4, 1995 there would be due and owing to claimant 101.57 weeks of permanent partial disability compensation at the rate of \$106.94 per week in the sum of \$10,861.90, which is ordered paid in one lump sum less any amount previously paid. Thereafter, the remaining balance in the amount of \$33,518.20 shall be paid at the rate of \$106.94 per week for 313.43 weeks or until further order of the director.

The respondent and its insurance carrier are herein awarded reimbursement against the Kansas Workers Compensation Fund for one-hundred percent (100%) of the liability in this matter.

Further award is made that claimant is entitled to future medical expense upon proper application to the director of workers compensation.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and insurance carrier with reimbursement to respondent and insurance carrier from the Kansas Workers Compensation Fund as follows:

OWENS, BRAKE & ASSOCIATES

Regular Hearing Transcript Dated October 21, 1993	\$633.80
Deposition of Dr. Milo Sloo Dated November 2, 1993	\$370.80
Deposition of Tom Roche Dated December 16, 1993	\$188.80
Deposition of Steven Lott Dated December 16, 1993	\$254.34
Total	\$1447.74

GENE DOLGINOFF ASSOCIATES, LTD

Deposition of Dr. Preston Koprivica Dated October 28, 1993	\$551.60
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DON K. SMITH & ASSOCIATES

Deposition of James Molski Dated December 6, 1993	\$319.75
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IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Jan Fisher, Attorney at Law, Topeka, KS
John W. Mize, Attorney at Law, Salina KS
Jeffrey E. King, Attorney at Law, Salina, KS
George R. Robertson, Administrative Law Judge
George Gomez, Director